In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 830

CAPTAIN DALE E. NOYD, PETITIONER

v.

MAJOR GENERAL CHARLES R. BOND, JR., COMMANDER, TWELFTH AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENTS

1. This supplemental memorandum is submitted to clarify the government's position that the petition for a writ of certiorari is now moot. Petitioner's reply to our Suggestion of Mootness indicated that the government was, in effect, arguing that "no Justice of this Court, nor even the entire Court, has the power, via habeas corpus, bail, release on recognizance, or any other remedy extraordinary or otherwise, to interrupt the running of a military sentence and thereby prevent it from becoming moot while the merits are under judicial scrutiny" (Reply Memorandum p. 6). Petitioner relied on ¶ 97c of the

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Manual for Courts-Martial, United States, 1951, as demonstrating that his petition is not moot. His characterization of the government's position, however, is wholly inaccurate and his reliance on ¶ 97c of the *Manual* misplaced.

First, we note that the present action involves only a relatively narrow challenge to the types of restraint permissible under the Uniform Code of Military Justice pending appellate review of a court-martial conviction, and is not an attempt to secure review of the "merits" of the conviction itself. Indeed, we expressly conceded in our Memorandum Suggesting Mootness (p. 2, n. 1) that the mootness of the present action, by reason of the expiration of the sentence to confinement, in no way affects the vitality of petitioner's separately pending proceedings to review the court-martial conviction itself.

Secondly, we in no way intimated that this Court, or a Justice thereof, is powerless to interrupt the running of a military sentence. Rather, our position was and is only that in *this* case the sentence continued to run from the date on which it was adjudged and was not interrupted by the order entered by Mr. Justice Douglas two days before it was to expire. Petitioner does not contest the general principle that under Article 57(b) of the Uniform Code, 10 U.S.C. 857(b), a period of confinement runs continuously and automatically from the date the sentence is adjudged, except for periods "during which the sentence to confinement is suspended". As we pointed out in our prior Memorandum (p. 3, n. 2), "suspension" in that sense refers only to the discretionary power of

military authorities to place a convicted serviceman in a status akin to probation in lieu of execution of all or part of his sentence (see Articles 71, 72, 74, 10 U.S.C. 871, 872, 874; ¶¶ 88e, 97a, 97b, 105, *Manual for Courts-Martial, United States, 1951*), and it is undisputed that petitioner's sentence to confinement was not "suspended".

Instead, petitioner points to ¶ 97c of the *Manual*, which lists the other factors—deemed implicit in the Code, see *United States* v. *Bryant*, 12 U.S.C.M.A. 133, 30 C.M.R. 133 (1961)—which interrupt the running of a sentence. See, AR 633–30, ¶ 5b; AFR 125–30, ¶ 5b ("inoperative time"). None of those exceptions to the general rule, however, applied to this case so as to toll the running of petitioner's sentence. Petitioner places particular reliance upon the "exception" which states (¶ 97c):

> Periods during which the person undergoing such a sentence * * * is erroneously released from confinement upon his petition for a writ of habeas corpus under a court order which is later reversed by a competent tribunal, shall be excluded in computing the service of the term of the punishment.

For several reasons, the Air Force claims no authority under this (or any other) provision of the *Manual* to hold petitioner for two more days of his sentence. For one, this clause of the *Manual* authorizes treatment of the sentence as tolled only when a prisoner has been released from "confinement". But this term of art in military law is not applicable to the case at bar. Drawing on the Code's distinctions (see

Article 9a, 10 U.S.C. 809(a)), the *Manual* distinguishes between "arrest" and "confinement", providing that "arrest" is the *moral* restraint imposed upon a serviceman by oral or written orders of competent authority directing him to remain within certain specified limits, while "confinement" is the "physical restraint of a person" (¶¶ 18a, 20a). In this case, exercising his authority under ¶ 21d of the *Manual* to determine the type of restraint, if any, appropriate following a military trial, petitioner's commanding officer chose to place petitioner in the status of "arrest in quarters" and not in "confinement", as those terms are used in military law. We are appending hereto a copy of the base commander's letter to petitioner advising him of this status and of its restrictions. In light of the commanding officer's decision to provide for restraint not amounting to "confinement", no exception in the Code or the *Manual* operated to toll the running of petitioner's sentence when Mr. Justice Douglas ordered him released from the lesser restrictions of "arrest in quarters".

In addition, ¶ 97c, on which petitioner relies, applies only to a release "erroneously" ordered on writ of habeas corpus, and permits treatment of the sentence as tolled during that period only when the order of release has been "reversed" by a competent tribunal. Neither the conditions nor the policies involved in that exception are relevant here. Mr. Justice Douglas's order did not involve release upon petition for a writ of habeas corpus. The relief sought and granted was in form and in fact simply a stay of mandate and enlargement on personal recognizance pending action on a

certiorari petition. There is no authority in military law to treat the interlocutory relief of admission to bail—what petitioner sought and received—as tolling the running of a sentence to confinement under Article 57(b), *supra,* which ordinarily runs continuously whether the serviceman is in confinement, under arrest, or under no restraint whatever pending review of the conviction.[1]

Finally, the stay-and-release order entered by Mr. Justice Douglas furnished purely interlocutory relief without adjudicating any legal question, and is to expire of its own force when the Court acts on the underlying petition for certiorari. In no sense, therefore, will the termination of the release order involve a "reversal" of an "erroneous" grant of habeas corpus.

2. The circumstances of this case underscore the premises of the mootness doctrine. Petitioner's personal interest in the case is now wholly academic: the

[1] The order entered by Mr. Justice Douglas directed that petitioner be placed in a "non-incarcerated status" and not assigned to duties which might as a practical matter lead to a court-martial for disobeying orders. That relief was expressly quoted from a preliminary injunction issued in petitioner's favor in another action brought *before* he was court-martialed. (The district judge had subsequently vacated the injunction for want of jurisdiction). There was, however, no danger that petitioner would have been assigned to duties inconsistent with his claimed conscientious objection even had Mr. Justice Douglas not so ordered. Under military law, a person in arrest status, as petitioner was at the time of the release order, cannot be assigned military duties involving command or the bearing of arms. *Manual* ¶ 20a. Furthermore, under Air Force regulations, an officer sentenced to dismissal by court-martial is automatically disqualified from flying status. ¶ 2-29(h), AF Manual 35-13.

action was instituted to test the permissibility of certain forms of restraint pending review of his conviction within the military appellate structure, but by reason of the expiration of his sentence to confinement at hard labor—which was never executed—there is no longer any restraint imposed upon him. (Indeed, he has been restored to duty.) In addition, the issues that he sought to raise, as we discussed more fully in our prior Memorandum (p. 4), have little prospective significance in light of the intervening passage of the Military Justice Act of 1968. Accordingly, the petition for a writ of certiorari should be granted and the cause remanded with directions to dismiss as moot.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1969.

APPENDIX

25 Jun 1968

Reply to attn of: CSC
Subject: Arrest in Quarters—Limitations on Your Activities
To: Captain Dale E. Noyd
Room 15, Building T–55
Cannon AFB, New Mexico 88101

1. Your place of arrest in quarters will continue to be Room 15, Building T–55, Cannon Air Force Base, New Mexico. However, the terms of your arrest are changed as follows to limit your activities:

a. You will be allowed to go to the dining hall only between 0700 and 0745 hours, and between 1145 and 1230 hours, and between 1700 and 1745 hours daily.

b. You will be allowed to visit the mail room only between 0700 and 0745 hours and between 1700 and 1745 hours daily.

c. You will be allowed to visit the Base Exchange only between 1000 and 1030 hours each Tuesday.

d. You will be allowed to visit the Base Laundry concessionaire only between the hours of 1030 and 1100 each Tuesday.

e. You will be allowed to visit the Base Library only between the hours of 1800 and 1900 each Thursday.

f. You will be allowed to visit the Base Barber Shop only between the hours of 0800 and 0900 each Tuesday.

g. You may visit the Base Gym for exercise between 0900 and 1030 hours on Friday provided you are accompanied by Captain Bruce H. Anderson or

Captain (Dr.) Gregory R. Bonomo, and you will associate with no other person during these periods.

h. You will be allowed to visit the Chapel only once on Sunday.

In case any of the facilities listed in b through g are to be closed at these enumerated times because of a holiday or inventory, etc., you may substitute the preceding day.

You will not be escorted on these trips, however, you will take only the time necessary to accomplish these trips and return immediately to your quarters, but in no event will you take more time than the times enumerated above. Upon leaving and returning to your quarters for any reason you will notify Security Police Operations. In case of inclement weather or some other reason you need motor transportation on any of these trips, the Security Police will provide such transportation. You will wear the appropriate uniform at all times when you are not in your quarters. You will not leave your quarters for any other reason without permission of the Base Commander, except as follows: You may leave your quarters to visit the Base Hospital without prior notification to anyone at any time you have a medical or dental emergency. In case you need medical or dental attention not amounting to an emergency, you will notify Security Police Operations and then proceed to the hospital.

2. You will be authorized to have TV cable, a telephone and maid service in your room at your own expense.

3. Your quarters will be off limits to all personnel with the following exceptions:

a. You may have any defense counsel visit you at any time.

b. Members of your family may visit you two times a week for a period of two hours per visit on Wednesdays between 1400 and 1600 hours and on Sundays between 1400 and 1600 hours.

c. You may have other friends visit you once a week for a period of one hour on Thursdays between 1500 and 1600 hours. Any other persons wishing to visit you must have prior permission of the Base Commander.

4. You will acknowledge receipt of this communication by indorsement hereon and indicate therein your complete understanding of the same.

GEORGE R. DOERR,
Colonel, USAF, Commander.

Receipt acknowledged and contents understood.

/s/ Dale E. Noyd,
DALE E. NOYD,
Captain, USAF.

Date: 28 Jun 68

U.S. GOVERNMENT PRINTING OFFICE: 1969